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No. 84-1522

FILED

JUL 2 1985

ALEXANDER

In the Supreme Court of the United States

OCTOBER TERM, 1984

DOUGLAS CHARLES DUFRESNE, PETITIONER

v.

BENJAMIN BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Artez v. *Mulcrone*, 673 F.2d 1169 6

DiNapoli v. *Northeast Regional Parole Commission*, No. 85-2054 (2d Cir. June 13, 1985) 6

Geraghty v. *United States Parole Commission*, 579 F.2d 238, vacated and remanded, 445 U.S. 388 ..... 7, 8

Gregorio v. *United States Parole Commission*, cert. denied, No. 83-5699 (Feb. 21, 1984) 8

Hayward v. *United States Parole Commission*, 659 F.2d 857, cert. denied, 456 U.S. 935 ..... 6, 7

Hood v. *United States Parole Commission*, cert. denied, No. 83-6263 (June 11, 1984) 8

INS v. *Chadha*, 462 U.S. 919 5

Paschal v. *Wainwright*, 738 F.2d 1173 6

Pickus v. *United States Board of Parole*, 507 F.2d 1107 7

Portley v. *Grossman*, 444 U.S. 1311 6

Prater v. *United States Parole Commission*, No. 84-1121 (7th Cir. June 12, 1985) 5

Richardson v. *United States Parole Commission*, 729 F.2d 1154 7

Rifai v. *United States Parole Commission*, 586 F.2d 695 6

Roth v. *United States Parole Commission*, 724 F.2d 836 6

Page

Cases—Continued:

Ruip v. *United States*, 555 F.2d 1331 6

Shepard v. *Taylor*, 556 F.2d 648 6

United States v. *Ferri*, 652 F.2d 325 8

United States ex rel. Forman v. *McCall*, 709 F.2d 852 7-8

Walker v. *United States Parole Commission*, cert. denied, No. 83-6237 (June 11, 1984) 8

Warren v. *United States Parole Commission*, 659 F.2d 183, cert. denied, 455 U.S. 950 ..... 6, 7

Weaver v. *Graham*, 450 U.S. 24 5

Zeidman v. *United States Parole Commission*, 593 F.2d 806 5

Constitution, statutes and regulation:

U.S. Const. :

Art. I, § 7 5

Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 1, 2, 3, 5, 6, 7, 8

Administrative Procedure Act, 5 U.S.C. 553 7

Continuing Appropriations, 1985—Comprehensive Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 *et seq.* :

§ 218(a)(5), 98 Stat. 2027 5

§ 235, 98 Stat. 2031 5

§ 235(b)(1), 98 Stat. 2032 5

18 U.S.C. 4206 6

Page

Constitution, statutes and regulation—Continued:

18 U.S.C. 4206(a) 5

21 U.S.C. 841 1

21 U.S.C. 952 1

28 C.F.R. 2.20 (1978) 2

Miscellaneous:

44 Fed. Reg. 26540-26548 (1979) 2

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the application to him of parole guidelines amended after he committed his offense violates the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3.

1. Petitioner formerly was a senior pilot for Pan American Airlines. On September 17, 1979, he pleaded guilty in the United States District Court for the Western District of Texas to one count of conspiracy to import cocaine, in violation of 21 U.S.C. 952. In exchange, one count charging conspiracy to import opium, in violation of 21 U.S.C. 952, and one count charging possession with intent to distribute opium, in violation of 21 U.S.C. 841, were dismissed. Petitioner was sentenced to a term of imprisonment of eight years.

The conduct on which the indictment was based occurred between March 1978 and March 1979. Following his initial parole hearing on March 21, 1980 at the Federal Prison Camp, Eglin Air Force Base, Florida (R. 42), petitioner was originally informed by the United States Parole Commission that he would be released after serving 52 months of his prison sentence. The Parole Commission set the release date in accordance with parole guidelines that went into effect on June 4, 1979. 44 Fed. Reg. 26540-26548 (1979). Under those guidelines, petitioner's offense was categorized as a "Greatest I" offense, because it involved the equivalent of 260 grams of pure heroin and because petitioner had a managerial interest in the drugs (Pet. App. 2). The guidelines provided for a range of imprisonment of between 40 and 52 months prior to release (*id.* at 25). Petitioner's presumptive release date subsequently was accelerated by six months, so that he would serve 46 months prior to parole (*id.* at 26 n.6).

After exhausting his administrative remedies, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida on August 24, 1982. He contended that the Parole Commission's use of the parole guidelines in effect on the date of his parole hearing, rather than those in effect on the date the offense was committed, violated the Ex Post Facto Clause of the Constitution. The guidelines in effect when petitioner committed the offense (28 C.F.R. 2.20 (1978)) graded the severity of a drug offense according to the street value of the drugs, while the guidelines that went into effect on June 4, 1979 ranked the seriousness of drug trafficking offenses according to the weight and purity of the drugs and the interest the defendant had in them. Petitioner argued that under the former guidelines, he would have been released on parole after serving 26 to 36 months in prison, because the offense involved less than $100,000 worth of drugs. Pet.

App. 26-27. The magistrate rejected the Parole Commission's determination that the street value of the opium involved was more than $100,000 and that petitioner's offense severity therefore would have been essentially the same even under the 1977 parole guidelines (*id.* at 3-5). The magistrate also accepted petitioner's ex post facto argument and directed the Commission to reestablish petitioner's release date under the 1977 guidelines that designated petitioner's offense severity in a lower category, which provided for a range of imprisonment of between 26 to 36 months (*id.* at 5).

The district court reversed (Pet. App. 7-17). It concluded that parole guideline changes constitute procedural changes permissible under the Ex Post Facto Clause, rather than substantive changes in parole eligibility, and that the new guidelines therefore could be applied in calculating petitioner's eligibility date (*id.* at 14-15). The district court also reversed the magistrate's finding that the street value of the drugs involved in the offenses was less than $100,000, and the court therefore found no ex post facto violation for this additional reason as well (*id.* at 16-17).

The court of appeals affirmed, holding that the Ex Post Facto Clause did not bar the Commission from considering petitioner for release under its revised guidelines (Pet. App. 20-37). The court explained that the revision of the guidelines did not implicate the purpose of the Clause to ensure that citizens will receive fair notice of criminal sanctions, because petitioner was on notice when he committed the offenses that his release would be committed to the discretion of the Commission and that the Commission could revise its guidelines in light of experience (*id.* at 32-35, 37). The court further explained that the amendment of the guidelines also did not present the additional concern to which the Ex Post Facto Clause is addressed—vindictive action by the legislature—because the guidelines are revised

not by Congress, but by the Commission, and because they do not affect the maximum or minimum sentence, the prisoner's eligibility for parole, or his mandatory release based on good time credits (*id.* at 35-37).

2. The court of appeals correctly rejected petitioner's ex post facto claim, and its decision does not conflict with any holding by this Court or by another court of appeals. That decision does not warrant review for a number of reasons.

a. First, we have been informed by the Parole Commission that petitioner is currently incarcerated[1] and is scheduled to be released on parole on July 11, 1985. Petitioner's contention that he should be released at an earlier date under the guidelines in effect in March 1979 therefore would be moot by the time the Court ruled on that contention.

b. Second, the result would be no different in this case irrespective of which set of parole guidelines is applied. As the district court found (Pet. App. 16-17), and as we argued on appeal (Br. 17-19), the street value of the drugs involved was more than $100,000. For this reason, the guidelines in effect at the time of the offense indicated a range of from 40 to 55 months' incarceration prior to release, while the guidelines in effect at the time of petitioner's initial parole hearing recommended a period of incarceration of 40 to 52 months. The guideline revision therefore had no adverse effect on petitioner.

c. In any event, as the court of appeals correctly held, use of parole guidelines in effect at the time a parole decision is made, rather than those in effect when the offense was

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[1]Petitioner states (Pet. 12-13) that he was released on bail pending appeal on September 17, 1982, and that he remained on bail after that date until the filing of the petition. However, we have been informed by the Parole Commission that petitioner was incarcerated from August 17, 1983 to February 2, 1984, and again from March 4, 1985 to the present time.

committed, does not violate the Ex Post Facto Clause. That Clause provides that "No Bill of Attainder or ex post facto Law shall be passed." Only Congress can "pass" a "Law." U.S. Const. Art. I, § 7; *INS* v. *Chadha,* 462 U.S. 919 (1983). It thus is clear that the Ex Post Facto Clause is addressed to actions of the legislature, not actions of an Executive agency, such as the Parole Commission, taken pursuant to a duly enacted law. See *Weaver* v. *Graham,* 450 U.S. 24, 28 (1981) (the Clause "forbids the Congress * * * to enact any law * * *" that enhances the punishment for an offense previously committed). In this case, the relevant statutory provision, 18 U.S.C. 4206(a), was enacted in 1976, and has not been amended since that time.[2] There accordingly has been no "Law" "passed" by Congress since petitioner committed the offenses in question in 1978 and 1979 that has affected the criteria for his release on parole.[3]

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[2]The existing statutory provisions governing parole were repealed, effective November 1, 1986, by Sections 218(a)(5) and 235 of the Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027, 2031. However, under Section 235(b)(1) of that Act (98 Stat. 2032), the parole provisions will remain in effect for five additional years as to any individual convicted prior to that date.

[3]In *Prater* v. *United States Parole Commission,* No. 84-1121 (June 12, 1985), the Seventh Circuit considered an ex post facto claim in a case in which the prisoner had committed the offense prior to Congress's amendment of the statutory provisions in 1976. A divided panel remanded for further proceedings to determine whether the 1976 amendments altered the administrative practice concerning the granting of parole in a way that disadvantaged the particular prisoner. Slip op. 14-18. *Prater* has no bearing on the instant case, however, because petitioner committed the offenses in question after the 1976 statutory amendments. Indeed, the Seventh Circuit in *Prater* expressly distinguished decisions of other courts of appeals (including the Eleventh Circuit's decision in the instant case) that had rejected ex post facto claims based on the guidelines (slip op. 7), observing that the Seventh Circuit itself appeared to have adopted a similar view regarding the guidelines in *Zeidman* v. *United States Parole Commission,* 593 F.2d 806, 807 (1979).

The Parole Commission's guidelines were revised in 1979, but those amendments of administrative standards did not implicate ex post facto concerns. In 18 U.S.C. 4206, Congress granted the Executive broad discretion in granting parole, just as criminal statutes traditionally have granted the judiciary broad discretion with regard to sentencing. A change in the guidelines that assist the Commission in the exercise of its discretion—reflecting its accumulated experience in applying the statutory criteria or a change in its view of the appropriate balancing of those criteria—therefore no more violates the Ex Post Facto Clause than would an increase in the average sentence imposed by the judiciary as a result of experience or a change in sentencing philosophy of individual judges. In such circumstances, the Parole Commission or courts would have taken action pursuant to laws passed by Congress that themselves remained unchanged, but gave individuals fair warning that the length of their sentences and release on parole would be committed to the broad discretion of the Judicial and Executive Branches. The courts of appeals therefore have generally rejected ex post facto claims premised on the impact of administrative parole guidelines. See *DiNapoli* v. *Northeast Regional Parole Commission,* No. 85-2054 (2d Cir. June 13, 1985); *Paschal* v. *Wainwright,* 738 F.2d 1173, 1180-1181 (11th Cir. 1984); *Roth* v. *United States Parole Commission,* 724 F.2d 836, 840 (9th Cir. 1984); *Artez* v. *Mulcrone,* 673 F.2d 1169, 1171 (10th Cir. 1982); *Warren* v. *United States Parole Commission,* 659 F.2d 183, 195-196 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Hayward* v. *United States Parole Commission,* 659 F.2d 857, 862 (8th Cir. 1981), cert. denied, 456 U.S. 935 (1982); *Rifai* v. *United States Parole Commission,* 586 F.2d 695 (9th Cir. 1978); *Shepard* v. *Taylor,* 556 F.2d 648 (2d Cir. 1977); *Ruip* v. *United States,* 555 F.2d 1331 (6th Cir. 1977). See also *Portley* v. *Grossman,* 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice).

Petitioner contends (Pet. 8), however, that the Third, Eighth, and District of Columbia Circuits have taken a contrary view. This contention is without merit. The District of Columbia Circuit decision upon which petitioner relies (Pet. 8 n.13), *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (1974), did not involve an ex post facto issue; the court there held only that the Commission must follow the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, when promulgating its guidelines. When later presented with the issue, the District of Columbia Circuit in fact rejected an ex post facto claim in *Warren* v. *United States Parole Commission, supra.* In *Richardson* v. *United States Parole Commission*, 729 F.2d 1154, 1155 (1984), the Eighth Circuit decision upon which petitioner relies (Pet. 8 n.13), the court declined to consider the ex post facto claim because the prisoner could not show that he would have received a more favorable determination under the prior guidelines. Furthermore, in *Hayward* v. *United States Parole Commission, supra*, the Eighth Circuit rejected an ex post facto claim where the prisoner had committed the offense before the guidelines were instituted, because the prisoner had no expectation of any particular parole system at that time. 659 F.2d at 862.

Finally, petitioner relies (Pet. 8 n.13, 11) on the Third Circuit's decision in *Geraghty* v. *United States Parole Commission*, 579 F.2d 238 (1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). However, in *Geraghty*, the Third Circuit did not hold that application of revised parole guidelines violated the Ex Post Facto Clause; it instead remanded for a factual determination regarding the role of discretion in parole decisions, so that it could determine whether the parole guidelines should be treated as "laws" for purposes of ex post facto analysis. See 579 F.2d at 266-267. The Third Circuit subsequently followed the same course in *United States ex rel. Forman* v. *McCall*,

709 F.2d 852, 862 (1983). Thus, contrary to petitioner's assertion, the Third Circuit has not held that the Commission's application of revised guidelines that result in a longer period of incarceration prior to release on parole violates the Ex Post Facto Clause.[4] This Court has denied certiorari in other cases in which the petitioner asserted a conflict with the Third's Circuit's decisions in *Geraghty* and *Forman*. See *Gregorio* v. *United States Parole Commission*, cert. denied, No. 83-5699 (Feb. 21, 1984); *Walker* v. *United States Parole Commission*, cert. denied, No. 83-6237 (June 11, 1984); *Hood* v. *United States Parole Commission*, cert. denied, No. 83-6263 (June 11, 1984). There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

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[4]In *United States* v. *Ferri*, 652 F.2d 325 (3d Cir. 1981), upon which petitioner also relies (Pet. 8 n.13), the Third Circuit also remanded without resolving the ex post facto issue.

DOJ-1985-07

for parole or his mandatory release date on good time.[21] *Accord, Portley v. Grossman,* 444 U.S. 1311, 1312-13, 100 S.Ct. 714, 715, 62 L.Ed.2d 723 (1980). The guidelines merely indicate when, in most cases, the prisoner can expect release. We agree with the second, sixth, seventh, and ninth circuits that the parole guidelines do not have the force and effect of law. *Ziedman v. United States Parole Commission,* 593 F.2d 806 (7th Cir. 1979); *Rifai v. United States Parole Commission,* 586 F.2d 695 (9th Cir. 1978); *Shepard v. Taylor,* 556 F.2d 648 (2d Cir. 1977); *Ruip v. United States,* 555 F.2d 1331 (6th Cir. 1977); *accord, Joost v. United States Parole Commission,* 535 F.Supp. 71 (D. Kan. 1982): *Kirby v. United States,* 463 F.Supp. 703 (D.Minn.), *vacated on other grounds,* 600 F.2d 146 (8th Cir. 1979); *Wilson v. United States Parole Commission,* 460 F.Supp. 73 (D.Minn. 1978). As the Sixth Circuit stated:

> [W]hat is involved in this case is not agency interpretation of law but an agency's setting up guidelines for itself to assure the uniform execution of its business. These guidelines are not law, but guideposts which assist the Parole Commission ... in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not filed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

[21] In this case we are not dealing with curtailed parole *eligibility.* Thus, *United States ex rel. Graham v. United States Parole Commission,* 629 F.2d 1040 (5th Cir.1980), is inapposite and does not support petitioner's case. *Graham* addressed a parole regulation, 28 C.F.R. § 2.14(a) (1978), not in issue here. The *Graham* court of appeals remanded the case to the district court and stated that the regulation could be an ex post facto law if it substantially diminished or eliminated the prisoner's eligibility for parole. 629 F.2d at 1044. The parole guidelines at issue here did not affect petitioner's parole eligibility. Parole eligibility is determined by the sentence imposed by the trial court.

Ruip,555 F.2d at 1335.

[8-10] Even a showing that the Commission adhered to the guidelines in the vast majority of cases[22] would not necessarily prove that the guidelines were law; otherwise, every policy that an agency adhered to consistently would become a law from which the agency could not vary. *Accord, Rifai,* 586 F.2d at 698. Congress intended that the Commission periodically amend the guidelines to reflect contemporary views concerning the seriousness of given crimes and parole recidivism. *E.g.*, S.Rep. No. 369, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S.Code Cong. & Ad. News 335. Such amendments are not indicative of provisions which have the force and effect of law. As the legislative history shows, "[t]he standards for release on parole [in the Parole Act] ... are not changed from [prior] law." *Id.* at 339. The Commission may follow its guidelines, disregard them, or change them. Parole remains an act of discretion. *See, e.g., Shahid v. Crawford,* 599 F.2d 666, 669 (5th Cir.1979); *Brown v. Lundgren,* 528 F.2d 1050, 1055 (5th Cir.), *cert. denied,* 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283 (1976).

Because the guidelines in question are not criminal laws and their amendment did not add to the punishment prescribed for petitioner's crime, petitioner has failed to establish two of the requisite elements of an ex post facto claim. Accordingly, the judgment of the district court denying his claim is

AFFIRMED.

[22] The Commission may deviate from the guidelines for "good cause." 18 U.S.C. § 4206(c) (1982).